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In The
Supreme Court of the United States

NATIONAL ASSOCIATION
OF HOME BUILDERS, et al.,

Petitioners,

v.

DEFENDERS OF WILDLIFE, et al.,

Respondents.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

DEFENDERS OF WILDLIFE, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICI CURIAE BRIEF OF ASSOCIATION OF CALIFORNIA WATER AGENCIES, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, WESTLANDS WATER DISTRICT, IMPERIAL IRRIGATION DISTRICT, SAN DIEGO COUNTY WATER AUTHORITY, NATIONAL WATER RESOURCES ASSOCIATION, AND NORTHERN COLORADO WATER CONSERVANCY DISTRICT IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* are water districts and agencies located in the western states that provide, or whose members provide, water supplies for urban, agricultural and industrial uses and power generation. The *amici* serve the water needs of some of the largest metropolitan and farming regions in the western states, such as the Cities of Los Angeles and San Diego and California's Central and Imperial Valleys. The *amici*, or their members, have entered into contracts with the United States, acting through the Secretary of the Interior or the U.S. Bureau of Reclamation ("Bureau"), under which the Bureau has agreed to, and does, deliver water from federal reclamation projects to the *amici* or their members. These federal projects include, among others, the Central Valley Project in California, which is the nation's largest federal reclamation project; various federal projects on the Colorado River, such as Hoover Dam and Glen Canyon Dam; and the Colorado-Big Thompson Project in Colorado. These projects, and others operated by the Bureau that provide water supplies to the *amici*, are a major source of water supplies for domestic, agricultural and industrial uses and power generation in the western states.

The Ninth Circuit held below that the Endangered Species Act (ESA) imposes requirements on federal agencies that override the agencies' obligations under their governing statutes and other authorities. Under the Ninth Circuit decision, the Bureau may be required to reallocate some of the water developed by federal reclamation projects for the purpose of benefiting endangered species, which would impair the contractual rights of the *amici* or their members to receive water supplies from the projects. Thus, the *amici* have an interest in this case.

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[1] The parties have consented to the filing of this *amici curiae* brief (Rule 37.2). This brief was not written in whole or part by the parties' counsel, and no one other than *amici* made a monetary contribution to its preparation (Rule 37.6).

The *amici* are as follows:

The Association of California Water Agencies (ACWA) represents approximately 90% of the public water agencies in California, which provide water supplies for domestic, agricultural and industrial uses in California.

The Metropolitan Water District of Southern California (MWD), the nation's largest urban water district, is a consortium of 26 cities and water districts located in southern California, which provides water supplies to approximately 18 million people residing in southern California.

The Westlands Water District (WWD), located in California's Fresno and King Counties, is one of the nation's largest agricultural water districts, and provides irrigation water and drainage service to the farmers located within its district and municipal and industrial water to local residents and entities.

The Imperial Irrigation District (IID), located in California's Imperial Valley, is one of the nation's largest irrigation districts, and provides water service and power to agricultural users in the Imperial Valley, and also power to customers in the Imperial and Coachella Valleys.

The San Diego County Water Agency (SDCWA) is the wholesale water supplier to its 23 member public agencies in San Diego, County, California, and provides approximately 80-90% of water supplies for such agencies.

The National Water Resources Association (NWRA) is a voluntary organization of western state water associations, whose members include cities, towns, water conservation and conservancy districts, irrigation and reservoir companies, ditch companies, farmers, ranchers and others with an interest in both water quantity and water quality issues in the western states. Its members include some of the West's largest water districts, such as the Central Arizona Water Conservation District (Arizona), the Colorado River Water Conservation District (Colorado), the Middle Rio Grande Conservancy District (New Mexico), and the Las Vegas Valley Water District (Nevada).

The Northern Colorado Water Conservancy District (NCWCD) operates the Colorado-Big Thompson Project in Colorado, which conveys an average of 213,000 acre-feet of water each year through the Rocky Mountains beneath the Continental Divide to irrigate over 693,000 acres and to supply approximately 750,000 people in 32 cities and towns and 12 water districts.

SUMMARY OF ARGUMENT

This case raises the question whether the Endangered Species Act (ESA) imposes requirements that override the specific requirements of other federal laws directing federal agencies to take actions that may affect endangered species. Under section 7(a)(2) of the ESA, a federal agency must consult with the Secretary of the Interior or the Secretary of Commerce (hereinafter collectively "Secretary") before taking action that may jeopardize endangered species, and the Secretary is then authorized to propose alternative courses of action to avoid jeopardy. The Ninth Circuit below held that section 7(a)(2) creates "additional authority" that "goes beyond" the agencies' existing authority under their governing statutes, and thus requires compliance with ESA requirements even though such compliance may conflict with the agencies' duties under their governing statutes. The court also held that a regulation adopted by the Secretary, which provides that section 7 applies to "discretionary" federal actions, 50 C.F.R. § 402.03, simply establishes "coterminous" requirements with statutory requirements and places a "gloss" on them. In short, the court held that section 7(a)(2) creates "additional authority" that overrides other potentially conflicting agency obligations, and that the Secretary's regulation does not substantially modify or limit the "additional authority" thus created.

The Ninth Circuit analysis is deficient in two major respects. First, section 7(a)(2) imposes requirements

applicable to federal agency "action," but does not indicate whether such "action" includes actions that an agency is specifically mandated to take under other statutory authority that may be inconsistent with ESA requirements. Thus, the provision does not indicate whether its terms apply to *all* agency action – irrespective of whether the agency has discretion under its governing statutes to comply with the terms – or instead applies only to action that the agency has discretion to take under its governing statutes. If the provision applies to both discretionary and nondiscretionary actions, the provision would be in conflict with other statutes that mandate specific agency action and do not allow the agency to exercise discretion in carrying out the mandates. Conversely, if the provision applies only to discretionary actions, the agency would have discretion under its other statutory authority to comply with ESA requirements and no conflict would occur. Under principles of statutory construction, statutes should be construed, if possible, to avoid conflicts. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 549 (1974). Therefore, section 7(a)(2), properly construed, applies only to action that an agency has discretion to take under its governing statutes. The Ninth Circuit's analysis, by interpreting section 7(a)(2) as applicable to all agency action irrespective of other statutory requirements, creates rather than avoids conflicts between the ESA and other statutes. Contrary to the Ninth Circuit decision, the ESA is not a superlaw that trumps all other laws defining agency missions and responsibilities.

Second, the Secretary has adopted a regulation interpreting section 7(a)(2) as applicable to "discretionary" federal actions – that is, actions that an agency has discretion to take under its governing statutes. Thus, while the ESA itself does not address possible conflicts with other statutes, the Secretary's regulation does address possible conflicts and provides an interpretation that avoids them. This Court has held that reasonable agency

interpretations of ambiguous statutes are entitled to deference, particularly where, as here, the interpretation is imbedded in a regulation adopted through the formal rulemaking process. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001). Since the Secretary's regulation provides a reasonable – and indeed the most logical – interpretation of the statute, the regulation is entitled to deference under *Chevron* and *Mead*. The Ninth Circuit decision, on the other hand, effectively nullifies the Secretary's regulation by interpreting it as imposing "coterminous" requirements with the statutory requirements, and thus as not having any practical meaning or significance in defining agency responsibilities. Rather than deferring to the Secretary's regulation as required by *Chevron* and *Mead*, the Ninth Circuit effectively wrote it out of existence.

Applying these principles here, the Clean Water Act (CWA) requires the Environmental Protection Agency (EPA) to approve Arizona's application to administer its CWA permit program if the program meets the criteria spelled out in the statute, as the Arizona program does. Under section 7(a)(2), as clarified by the Secretary's regulation, the EPA has no discretion under the CWA to disapprove the Arizona program in order to benefit endangered species. Therefore, section 7(a)(2) does not apply to the EPA's approval of the Arizona's program.

If Congress wishes to expand the scope of the ESA to impose agency obligations that override agency obligations under other statutes, Congress has the power to do so. To date, Congress has not done so. The responsibility for changing the relationship between the ESA and other laws – and for elevating ESA requirements above those of other laws, if that is the desired outcome – rests with the legislative rather than the judicial branch.

ARGUMENT

I. SECTION 7(a)(2) OF THE ENDANGERED SPECIES ACT DOES NOT IMPOSE REQUIREMENTS THAT CONFLICT WITH AND OVERRIDE A FEDERAL AGENCY'S SPECIFIC OBLIGATIONS UNDER ITS GOVERNING STATUTES.

A. The Ninth Circuit Held That Section 7(a)(2) Imposes Requirements That Override Specific Agency Obligations Under the Agencies' Governing Statutes.

Section 7(a)(2) of the Endangered Species Act (ESA) requires federal agencies – in consultation with either the Secretary of the Interior or the Secretary of Commerce (hereinafter collectively "Secretary") – to "insure" that "any action authorized, funded, or carried out" by them is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of" the species' critical habitat. 16 U.S.C. § 1536(a)(2). The agency must consult with the Secretary before taking any prospective action that "will likely affect" such species. *Id.* at § 1536(a)(3). If, as a result of such consultation, the Secretary determines that the proposed agency action will jeopardize the species or impair its critical habitat, the Secretary must issue a "biological opinion" setting forth "reasonable and prudent alternatives" that the Secretary believes "would not violate" section 7(a)(2) and "can be taken" by the agency. *Id.* at § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)(8), -(h). Thus, section 7(a)(2) requires federal agencies to consult with the Secretary before taking any action that may affect an endangered or threatened species, and the Secretary, if he determines that the proposed action may jeopardize the species or impair its habitat, must propose "reasonable and prudent alternatives" to avoid these effects. *See Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

The Ninth Circuit held that section 7(a)(2) requires the EPA to consult with the Secretary before approving

Arizona's application to administer its National Pollutant Discharge Elimination System (NPDES) permit program under the Clean Water Act (CWA). *Defenders of Wildlife v. U.S. Environmental Protection Agency*, 420 F.3d 946 (9th Cir. 2005); App. 1a-67a. The Ninth Circuit reasoned that the EPA's approval of the Arizona NPDES program will potentially jeopardize threatened or endangered species in Arizona, because – once the federal permit program is transferred to the state – the mitigation measures adopted for the species under the federal program will no longer apply. The court acknowledged that the CWA, according to its express terms, mandates the EPA to approve state applications to administer NPDES permit programs if the programs meet the criteria spelled out in the CWA. Specifically, section 402(b) of the CWA provides that the EPA "shall approve" applications by states to administer their NPDES programs "unless" the EPA determines that the proposed state program fails to meet these statutory criteria. 33 U.S.C. § 1342(b). These statutory criteria are largely nondiscretionary; they require that the state program include, for example, notice requirements, procedures for civil and criminal enforcement, and provisions for monitoring reports. *Id.* As the Ninth Circuit noted, the Arizona program has not been challenged on grounds that it fails to meet these statutory criteria. *Defenders*, 420 F.3d at 963 n. 11; App. 31a.

The Ninth Circuit ruled, nonetheless, that the EPA cannot approve the Arizona program unless and until the agency has consulted with the Secretary pursuant to section 7(a)(2) of the ESA, which triggers the Secretary's authority and responsibility to propose reasonable and prudent alternatives to avoid jeopardy. According to the court, section 7(a)(2) creates authority that "goes beyond that conferred by the agencies' governing statutes," and imposes requirements "in addition to those created by the agencies' own governing statute." *Defenders*, 420 F.3d at 964, 967; App. 34a, 38a. *See also id.* at 969; App. 42a (agency has "continuing decisionmaking authority over the challenged action"), *id.* at 970; App. 44a (section 7(a)(2) is "a modicum of additional authority to agencies, beyond

that conferred by their governing statutes"). Thus, the Ninth Circuit held that the agency must consult and avoid jeopardy under section 7(a)(2) even though these requirements may be inconsistent with the agency's specific responsibilities under its governing statutes – a term that, as used in this brief, refers to the agency's enabling statutes defining its missions and responsibilities, such as the CWA here. Under the Ninth Circuit decision, the consultation and no-jeopardy requirements of section 7(a)(2) override the agency's specific obligations under its governing statutes, where these requirements are in conflict.

B. Under Applicable Principles of Statutory Construction, Section 7(a)(2) Cannot Be Properly Construed as Imposing Requirements That Override Agency Obligations Under the Governing Statutes.

The Ninth Circuit correctly concluded that section 7(a)(2) imposes additional requirements beyond those established in the agency's governing statutes, although, as will be explained, these additional requirements do not apply to the extent they are inconsistent with those established in governing statutes. Section 7(a)(2), which requires federal agencies to consult with the Secretary before taking action that may jeopardize endangered species or impair their critical habitats, 16 U.S.C. § 1536(a)(2), imposes requirements not found in other federal laws defining agency missions and responsibilities. As this Court stated in *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 175 n. 20, some earlier federal statutes, such as the Lacey Act and the Migratory Bird Treaty Act, provided protection of fish and wildlife under specific circumstances, but prior to enactment of the ESA "there were few laws regulating these creatures." Thus, the responsibility of federal agencies to avoid jeopardy to endangered species – *qua* endangered species – arises solely from the ESA, not from other statutes. If an agency has sufficient latitude under its governing statutes to avoid taking actions that may jeopardize an endangered

species, the agency violates the ESA if it nonetheless takes the action.

On the other hand, the ESA contains no language indicating that the consultation and no-jeopardy requirements of section 7(a)(2) apply to the extent they are inconsistent with other specific obligations imposed in the governing statutes. Section 7(a)(2) requires that an agency "insure" that "any action authorized, funded, or carried out" by it does not cause jeopardy. The word "insure" describes what the agency must do regarding actions falling within the scope of the statute; the agency must "insure" – that is, "make certain," MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed.), p. 607 – that the action does not cause jeopardy. The word "insure" does not, however, describe what actions fall within the statutory scope, which is the question raised here. Thus, although the Ninth Circuit regarded the word "insure" as highly probative in defining agency responsibilities under the ESA, *Defenders*, 420 F.3d at 967; App. 38a, the word cannot bear the weight the Ninth Circuit placed on it.

The scope of the statute, as applied to agency action, is instead described in the phrase "any action authorized, funded, or carried out" by the agency. This phrase describes the statutory reach as it applies to agency action. The phrase does not indicate, however, whether it applies to *all* agency action that may affect endangered species – regardless of whether the agency has authority under its governing statutes to comply with ESA requirements – or instead applies only to action affecting endangered species that the agency can permissibly take under its other statutory authority. In other words, the phrase does not indicate whether it applies to both discretionary and nondiscretionary actions – as defined in the agency's governing statutes – or only to discretionary actions. This question is crucial in determining whether the ESA conflicts with other statutes. If section 7(a)(2) applies to both discretionary and nondiscretionary actions, the provision is in conflict with the governing statutes, because it requires agencies to violate their other statutory responsibilities in complying with ESA requirements.

Conversely, if section 7(a)(2) applies only to discretionary actions, no conflict occurs because the agencies can comply with ESA requirements without violating their other statutory responsibilities. Congress did not address this conflict issue in section 7(a)(2). Congress did not indicate whether the provision applies to both discretionary and nondiscretionary action, or discretionary action only, nor did Congress otherwise provide clarification by employing the commonly-used phrase "notwithstanding the requirements of any other law." Thus, section 7(a)(2) does not define the scope of agency "action" in cases where potential conflicts with other statutory requirements may occur. The provision is silent on how to resolve such conflicts.

Since the ESA is silent on the subject of conflicts, the statute cannot be properly construed as imposing requirements that conflict with, and override, an agency's obligations under its governing statutes. Under rules of statutory construction, statutes should be construed harmoniously if possible, so that conflicts between them are avoided. *Morton v. Mancari*, 417 U.S. 535, 549 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."). If the ESA were interpreted as imposing requirements inconsistent with other statutory requirements, the ESA would impliedly repeal the other statutory requirements, contrary to this Court's admonition that "repeals by implication are not favored," and "[t]he intention of the legislature to repeal must be clear and manifest." *Watt v. Alaska*, 451 U.S. 259, 267 (1981). *See also Mancari*, 417 U.S. at 550 ("[I]n the absence of an intent to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable."); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) ("[T]he intent of the legislature to repeal must be clear and manifest."). Thus, section 7(a)(2), properly construed, requires federal agencies to consult and avoid jeopardy to the extent – but only to the extent – that such actions are not inconsistent with specific mandates contained in the agency's governing statutes. Stated

differently, section 7(a)(2) requires federal agencies to take certain actions to the extent the agencies have discretion under their governing statutes to take the actions, and does not apply to the extent that the agencies lack such discretion.

Indeed, the ESA contains language specifically indicating that section 7(a)(2) does *not* apply where its requirements are inconsistent with other agency requirements under the governing statutes. Under section 7(b)(3)(A), the Secretary may propose "reasonable and prudent alternatives" to avoid jeopardy if the Secretary "believes" that action "can be taken" by the agency to avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A). Thus, if the Secretary believes that the action "can[not] be taken" by the agency under its governing statutes, the Secretary cannot propose alternatives requiring the agency to take such action. Since the Secretary's authority to propose alternatives goes hand in hand with the agency's obligation to consult, section 7(b)(3)(A) strongly suggests that section 7(a)(2) applies only where the agency has discretion to take the action under its governing statutes.

The proper analytical framework is that applied by this Court in *California v. United States,* 438 U.S. 645 (1978), which involved potential conflicts between federal laws defining the responsibilities of federal agencies to operate reclamation projects authorized by Congress. In *California*, this Court held that section 8 of the Reclamation Act of 1902, 43 U.S.C. §§ 372, 383 – which provides that the federal operating agencies must "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution" of water – requires the federal agencies to comply with state water rights laws in operating the projects, both in acquiring water rights for the projects and in distributing water from them. The Court also stated, however, that the federal agencies' obligation to comply with state laws under section 8 applies only to the extent not "inconsistent with other congressional directives," found either in the Reclamation Act or other federal laws. 438 U.S. at 668. Thus, as section 8 of the Reclamation Act imposes agency obligations to the

extent not in conflict with other specific federal laws, section 7(a)(2) of the ESA similarly imposes agency obligations to the extent not in conflict with other specific federal laws.[2]

A similar analytical framework was applied by this Court in *Department of Transportation v. Public Citizen, et al.*, 541 U.S. 752 (2004). There, this Court held that the Federal Motor Carrier Safety Administration, in preparing an Environmental Impact Statement under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, was not required to consider the environmental effects of removing a moratorium that barred entry of Mexican trucks into the United States, because the President had removed the moratorium and thus the agency had no discretion in deciding whether to remove it. The Court reasoned that the agency "lack[ed] the power" to act on whatever information might be developed in the environmental statement, and there was no "causal connection" between the proposed agency action and its environmental effects. *Id.* at 768. By the same reasoning, an agency is not required to consult under section 7(a)(2) if the agency lacks the power under its governing statutes to comply with ESA requirements, and no "causal connection" exists between the agency action and the effects on endangered species. The effects on endangered species, if they occur, are caused by the congressional directive mandating the agency to take certain actions, not the agency's action in complying with the congressional mandate.

The Ninth Circuit stated that its analysis of section 7(a)(2) was supported by the different language appearing in that provision and section 7(a)(1). As the Ninth Circuit observed, section 7(a)(1) requires agencies to "utilize their

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[2] To be sure, the *California* decision addressed the applicability of state water laws to federal reclamation projects, which involves significant constitutional issues concerning federal-state relations and property rights.

authorities" to conserve endangered species and section 7(a)(2) – while requiring agencies to consult and avoid jeopardy – does not employ the "utilize their authorities" phrase. 16 U.S.C. §§ 1536(a)(1), -(a)(2); *Defenders,* 420 F.3d at 965; App. 34a-35a, 46a. Congress may have employed the "utilize their authorities" phrase in section 7(a)(1) but not section 7(a)(2) because the former provision imposes an *affirmative* obligation to conserve endangered species and the latter imposes a *negative* obligation to avoid taking jeopardy-causing actions; the "utilize their authorities" phrase is more appropriate for an affirmative command than a negative one. Further, the requirements of sections 7(a)(1) and 7(a)(2) were originally part of the same provision, and Congress placed the requirements in separate provisions in 1978 without any apparent attempt to change their meanings.[3] Finally, section 2(c) of the ESA, which is a blanket provision spelling out Congress' policy in enacting the CWA, provides that federal agencies "shall utilize their authorities in furtherance of the purposes of this chapter," 16 U.S.C. § 1531(c). Thus, section 2(c) makes the "utilize their authorities" phrase broadly applicable to all statutory requirements, including section 7(a)(2). For these reasons, there is no basis for distinguishing between the provisions in terms of the relevance of agency obligations arising under other statutory authority.

In summary, section 7(a)(2) cannot be facially construed as requiring federal agencies to take actions that they do not have discretion to take under their governing statutes. In enacting the ESA, Congress directed federal

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[3] As originally enacted by Congress, sections 7(a)(1) and 7(a)(2) were part of a single provision, and the phrase "utilize their authorities" applied to the entire provision. Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973). In 1978, Congress amended the ESA by separating the two provisions, and explained in the legislative history that this revision merely restated "existing law." H.R. Conf. Rep. No. 95-1804, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9486.

agencies to exercise their existing authority to consult and avoid jeopardy – to the extent the agencies have discretion to take these actions under their governing statutes – but did not create new authority and responsibilities that override the agencies' specific obligations under other statutory authority. The Ninth Circuit's conclusion – that since the ESA creates "additional authority," the additional authority overrides all other authority – is a *non sequitur*; the creation of a requirement that applies where potential conflicts do not occur does not imply the creation of a requirement where such conflicts do occur. *See Morton v. Mancari*, 417 U.S. 535, 549, 550 (1974). Thus, a proper construction of section 7(a)(2) avoids conflicts with other statutes, rather than, as the Ninth Circuit decision does, invites conflicts. The ESA requires federal agencies to act within their specific constraints under other laws, but not beyond them. Contrary to the Ninth Circuit decision, the ESA is not a superlaw that trumps all other statutes defining agency missions and responsibilities.[4]

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[4] The ESA contains safeguards to ensure that federal agency action will not harm endangered species or impair their habitats even though section 7(a)(2) may not apply to the agency action. Under section 9, no "person," including a federal agency, may "take" or "harm" an endangered species unless the Secretary has issued a permit authorizing an incidental take of the species. 16 U.S.C. §§ 1532(13), 1538(a)(1)(B), 1532(19). The Secretary has adopted regulations defining "harm" as including "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns. . . ." 50 C.F.R. § 17.3 (2000); *Babbitt v. Sweet Home Chapter*, 515 U.S. 687 (1995). As the Ninth Circuit noted in another case, section 9 ensures that federal agency actions will not harm endangered species or impair their habitats regardless of whether section 7(a)(2) applies to the agency action. *Environmental Protection Information Center v. Simpson Redwood Company*, 255 F.3d 1073, 1083 (9th Cir. 2001).

II. THE SECRETARY'S REGULATION CLARIFIES THAT SECTION 7(a)(2) APPLIES TO ACTIONS THAT AN AGENCY HAS DISCRETION TO TAKE UNDER ITS GOVERNING STATUTES, AND IS ENTITLED TO DEFERENCE UNDER THIS COURT'S DECISIONS IN *CHEVRON* AND *MEAD*.

A. The Secretary's Regulation Construes Section 7(a)(2) as Applicable to Action that the Agency Has Discretion To Take Under its Governing Statutes.

As argued above, section 7(a)(2), construed facially, does not require federal agencies to consult and avoid jeopardy in cases where the agencies lack discretion to take these actions under their governing statutes. The Secretary has adopted a regulation clarifying that section 7 applies to "discretionary" federal action, that is, action that the agency has discretion to take under its governing statutes. Thus, the Secretary's regulation both clarifies and properly interprets the statute, and is entitled to deference by the courts.

In 1986, the Secretary adopted regulations defining federal agency actions that fall within the scope of section 7. 50 C.F.R. §§ 402.02, 402.03. The regulations provide, *inter alia*, that "Section 7 and the requirements of this part apply to all actions in which there is *discretionary Federal involvement or control.*" *Id.* at § 402.03 (emphasis added). This regulation interprets section 7(a)(2), which requires agencies to consult and avoid jeopardy, as applicable to agency actions involving "discretionary Federal involvement or control." Whether an agency has "discretion[]" under the regulation to consult and avoid jeopardy depends on whether such discretion is found in the agency's governing statutes. The regulation does not provide that such discretion is created by section 7(a)(2) itself; otherwise, all agency action would be "discretionary" and the regulation would have no practical meaning. Thus, the regulation provides that the ESA requirements apply to the extent the agency has discretion to meet

them under its governing statutes. If the agency lacks such discretion, the requirements do not apply.

This conclusion – that agency discretion must be found outside the ESA and is not created by it – is supported by another regulation adopted by the Secretary in 1986, which provides that the Secretary's authority to propose jeopardy-avoiding alternatives applies to the extent the alternatives "can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction." *Id.* at § 402.02. Thus, the Secretary cannot propose alternatives that are beyond an agency's "legal authority and jurisdiction," as defined in the agency's governing statutes. Since the Secretary cannot propose alternatives inconsistent with the agency's authority and jurisdiction, the agency is not required to consult with the Secretary before taking action falling within this category, because the agency's jeopardy-avoiding responsibilities go hand in hand with the Secretary's responsibility to propose jeopardy-avoiding alternatives.[5]

This Court has interpreted and applied the word "discretion" – the key concept in the Secretary's regulation – in other contexts as involving the exercise of judgment. For example, a writ of mandate lies only to compel a ministerial act, not a discretionary one. *See, e.g., Miguel v. McCarl*, 291 U.S. 442 (1934). This Court has interpreted the word "discretion" in that context as an exercise of judgment, as distinguished from a ministerial act. *Id.* at 451. Similarly, the Administrative Procedures Act (APA), pursuant to which this action was brought, precludes judicial review of "discretionary" federal actions but authorizes review of actions constituting an "abuse of

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[5] Similarly, section 7(b)(3)(A) provides that the Secretary's biological opinion must describe how the agency action "affects" the endangered species or its critical habitat, 16 U.S.C. § 1536(b)(3)(A), and the Secretary's regulation defines the "effects" of the agency action as those "caused" by the agency action. 50 C.F.R. § 402.02. If a federal statute requires an agency to take action that may affect an endangered species, the "cause" of the "effect" is the statute mandating the action, not the agency action complying with it.

discretion." 5 U.S.C. §§ 701(a)(2), 706(2). As in the mandate context, this Court has defined agency "discretion" under the APA as dependent on whether the agency exercises "judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-416 (1971). As others have noted, agency discretion under the APA and other laws depends on whether the law allows the agency to make more than one choice, or instead limits the agency to a single choice. J. Rogers, "A Fresh Look at Agency 'Discretion,'" 57 TUL. L. REV. 776, 777 (1983); *see also* MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed.), p. 332 ("discretion" defined as "individual choice or judgment"). If the governing statute directs that an agency take specific action and does not allow the agency to exercise judgment in deciding whether to take it, the agency has only one choice in carrying out its statutory responsibilities, and hence its action is not "discretionary."

Thus, although section 7(a)(2) does not address the subject of possible conflicts with other statutes – and must be construed under principles of construction as applicable only to discretionary actions – the Secretary's regulation does address the subject of conflicts and resolves them by construing the statute, properly, as limited to discretionary actions. The Secretary's interpretation thus converges with the proper statutory construction. Unlike the Ninth Circuit interpretation, which creates conflicts between statutory requirements, the Secretary's interpretation avoids conflicts. The Secretary's harmonious interpretation of these different statutory requirements is consistent with the principle that statutes must be construed, if possible, harmoniously rather than as in conflict. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 549 (1974).

B. The Secretary's Regulation Is Entitled to Deference Under This Court's Decisions in *Chevron* and *Mead*.

The Secretary's regulation clarifying the meaning of the jeopardy clause is entitled to deference under this

Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), as partially modified in *United States v. Mead Corp.*, 533 U.S. 218 (2001). According to *Chevron*, the courts follow a two-step process in determining whether to defer to federal agency interpretations of statutes they are charged with enforcing. First, the courts determine whether the statute is ambiguous; if the statute is not ambiguous, the courts construe the statute without deferring to the agency interpretation. *Chevron*, 467 U.S. at 842, 845. Second, if the statute is ambiguous, the courts defer to the agency interpretation if it is "reasonable." *Id.* "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843. Although *Chevron* and *Mead* may diverge regarding the appropriateness of deference in cases not involving formal agency rulemaking, both decisions support deference to agency interpretations that, as in this case, were adopted through the formal rulemaking process. As this Court has stated, "The latitude the ESA gives the Secretary in enforcing the statute, together with the degree of regulatory expertise necessary to its enforcement, establishes that we owe some degree of deference to the Secretary's reasonable interpretation." *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995). Since the Secretary's regulation interpreting section 7(a)(2) provides a reasonable – and indeed the most logical – interpretation of the provision, the regulation is entitled to deference under this Court's decisions in *Chevron* and *Mead*.

The Secretary's regulation is particularly worthy of deference because it limits rather than expands the regulatory jurisdiction of federal agencies, and thus limits the preemptive effect of federal law as applied to state and local laws regulating land use and water use. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), this Court expressly declined to grant *Chevron* deference to an Army Corps of Engineers regulation broadly interpreting the Corps'

jurisdiction to regulate "waters of the United States" under the CWA, 33 U.S.C. § 1362(7), in part because the Corps' broad definition of its jurisdiction would result in a "significant impingement of the States' traditional and primary authority over land and water use." 531 U.S. at 174. Thus, *Chevron* deference is more appropriate as applied to federal agency interpretations that, as here, limit federal intrusion into areas traditionally regulated by state and local governments under their police powers.

The Ninth Circuit, rather than deferring to the Secretary's regulation as required by *Chevron* and *Mead*, interpreted the regulation in a way that effectively nullified its meaning and effect. According to the Ninth Circuit, an agency's "discretionary involvement" within the meaning of the regulation is "coterminous" with the statutory reference to actions "authorized, funded, or carried out" by the agency. *Defenders,* 420 F.3d at 969; App. 43a. The regulation, the court stated, merely provides a "gloss" on the statutory phrase. *Id.* at 967; App. 39a. As noted earlier, however, the court interpreted the statutory phrase as creating "additional authority," even though such authority is inconsistent with the requirements of the agency's governing statute, in this case the CWA. *Id.* at 967; App. 38a-39a. Thus, under the Ninth Circuit analysis, the statute creates "additional authority" that overrides other statutory obligations, and the agency's "discretion" under the regulation is the same as the "additional authority" created by the statute. Under the court's reasoning, section 7(a)(2) *itself* creates agency "discretion" to comply with its requirements, even though the section 7(a)(2) requirements are inconsistent with the agency's other statutory obligations. If, as the Ninth Circuit reasoned, section 7(a)(2) itself creates agency "discretion," then *all* agency action affecting endangered species is necessarily "discretionary," and the regulation has no practical effect in defining the scope of the statute as it applies to agency action. The Ninth Circuit, rather than deferring to the agency regulation as required by *Chevron* and *Mead*, interpreted the regulation as meaningless.

Applying the Secretary's regulation to the instant case, the EPA has no "discretionary" authority to disapprove the Arizona program under the CWA. Section 402(b) of the CWA expressly provides that the EPA "shall approve" the Arizona program if it meets the statutory criteria of the CWA, 33 U.S.C. § 1342(b), as the Arizona program does. The Ninth Circuit did not suggest that the EPA has any discretion under the CWA to disapprove the Arizona program, and acknowledged that none of the parties have challenged the Arizona program on that ground. *Defenders*, 420 F.3d at 963 n. 11; App. 31a. Since the EPA lacks discretion in deciding whether to approve the Arizona program, section 7(a)(2) does not apply to the EPA's action.

C. The Ninth Circuit Decision Goes Beyond Federal Appellate Case Authority by Construing an Agency's "Discretion" as Independent of its Obligations Under Its Governing Statutes and Other Authorities.

The Ninth Circuit decision goes beyond existing federal appellate case authority by holding that section 7(a)(2) itself creates agency discretion that overrides the agency's obligations under its governing statutes. Although several appellate decisions have considered whether agency action is "discretionary" under the Secretary's regulation, these decisions have considered whether such agency discretion is found in the agency's governing statutes or other authorities outside the ESA. None have held, at least of which we are aware, that section 7(a)(2) itself creates such discretion.

For example, the Ninth Circuit held in one case that the Bureau of Land Management did not have discretion in a right-of-way agreement to prevent a logging company from building a road that may affect endangered species, because the agreement did not authorize the agency to prevent construction of the road in order to benefit endangered species. *Sierra Club v. Babbitt*, 65 F.3d 1502 (1995).

The Ninth Circuit held in another action that the National Marine Fisheries Service had discretion to impose conditions in fishing permits for the protection of endangered species under the High Seas Fishing Compliance Act, 16 U.S.C. §§ 5501-5509, because that statute granted authority to the agency to impose such conditions. *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969 (9th Cir. 2003). The District of Columbia Circuit held in another action that the Federal Energy Regulatory Commission did not have discretion to impose conditions in annual licenses for the protection of endangered species, because the Federal Power Act, 16 U.S.C. §§ 791a-828c, did not authorize such conditions to be imposed in annual licenses. *Platte River Whooping Crane Critical Habitat Maintenance Trust v. Federal Energy Regulatory Comm'n*, 962 F.2d 27 (D.C. Cir. 1992). The Ninth Circuit held in another action that the Forest Service had discretion to consult and avoid jeopardy before approving Land Resource Management Plans, because the plans provided for "ongoing agency activity." *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).[6]

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[6] There are other examples of federal appellate decisions that have considered agency "discretion" under the Secretary's regulation by reference to agency governing statutes or other such authorities. *See, e.g., Ground Zero Center v. U.S. Department of the Navy*, 383 F.3d 1082 (9th Cir. 2004) (Department of the Navy not required to consult regarding effects of submarine missile upgrade program because President made decision to select program site); *Environmental Protection Information Center v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001) (Fish and Wildlife Service lacked discretion to reinitiate consultation to consider effect of incidental take permit on endangered species, because permit did not authorize consideration of effects of species not listed when permit issued); *Natural Resources Defense Council v. Houston*, 146 F.3d 1118 (9th Cir. 1998) (Bureau of Reclamation required to consult before renewing water delivery contracts, because contracts afford discretion); *American Forest and Paper Ass'n v. United States*, 137 F.3d 291 (5th Cir. 1998) (EPA not required to consult regarding approval of state application to administer NPDES program because CWA requires approval if state program meets specified

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Although some of these decisions held that the agency had discretion to consult and avoid jeopardy and others held that the agency lacked such discretion – and although the decisions appear to diverge in terms of whether such agency discretion should be broadly or narrowly construed[7] – all of these decisions examined the agency's discretion in

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criteria in CWA); *Conservation Law Foundation v. Andrus*, 623 F.2d 712 (1st Cir. 1979) (Secretary of Interior required to consult before approving lease sales under Outer Continental Shelf Lands Act, because agreements require "future action" and have "implied condition" that agreements will not violate ESA).

[7] In our view, some of the above-cited decisions improperly applied the Secretary's regulation in broadly construing agency discretion under other statutes and authorities. In one case, for example, the Tenth Circuit ruled, in a 2-1 panel decision, that the Bureau of Reclamation's contracts with water users relating to the San Juan-Chama Project in New Mexico afforded discretion for the Bureau to reallocate project water from the contractors for the benefit of the endangered silvery minnow – even though the project imported water from a Colorado River tributary into the Rio Grande and the imported water had no connection with the Rio Grande, which was the minnow's natural habitat. The court stated that the Bureau's discretion was contained in a "shortage clause" that immunized the United States from liability for shortage conditions caused by drought or "other causes"; in the panel majority's view, the "other causes" included the ESA requirements. *Silvery Minnow v. Keyes*, 333 F.3d 1109, 1127-1131 (10th Cir. 2003), *vacated as moot*, 855 F.3d 1215 (2004). *See also O'Neill v. United States*, 50 F.3d 677, 680-681 (9th Cir. 1995). A contractual provision *immunizing* the United States from liability for water shortages caused by drought or "other causes" cannot be properly construed as *creating* discretion for the United States to reallocate contracted-for water in order to benefit endangered species.

In a similar vein, some of the above-cited decisions held that federal agencies had discretion to consult and avoid jeopardy because the governing statutes provided for "ongoing agency activity." *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969 (9th Cir. 2003); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994); *Conservation Law Foundation v. Andrus*, 623 F.2d 712 (1st Cir. 1979). The existence of "ongoing" agency authority does not, itself, provide discretion for an agency to consult and avoid jeopardy notwithstanding other legal requirements. Whether an agency has such discretion depends on the specific nature of the agency's obligations under the relevant statutes governing the agency action.

terms of the agency's governing statutes or other authorities, and none concluded that the ESA itself afforded such discretion. The Ninth Circuit decision in this case is the first, and only, federal appellate decision of which we are aware that construes section 7(a)(2) itself as the source of agency discretion under the Secretary's regulation.

D. The Ninth Circuit's Decision Is Not Supported by this Court's Decision in *Tennessee Valley Authority v. Hill.*

In support of its decision, the Ninth Circuit cited this Court's decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). 420 F.3d at 964-965; App. 32a-36a. In *Hill*, the Court held that section 7(a)(2) precluded the Tennessee Valley Authority (TVA) from completing construction of the nearly-completed Tellico Dam, because the Secretary of the Interior had determined that completion of the dam would harm the critical habitat of the endangered snail darter. 437 U.S. at 161, 184. *Hill* was decided in 1978, prior to the Secretary's adoption of the 1986 regulation, which interpreted section 7(a)(2) as limited to "discretionary" federal actions. Thus, *Hill* had no opportunity to consider the meaning, effect or validity of the Secretary's regulation, as several courts have noted. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1510 (9th Cir. 1995); *Platte River Whooping Crane v. Federal Energy Regulatory Comm'n*, 962 F.2d 27, 34 (D.C. Cir. 1992); *Defenders of Wildlife v. Norton*, 257 F.Supp.2d 53, 67 (D.D.C. 2003). Further, since *Hill* was decided before this Court's decisions in *Chevron* and *Mead*, which were issued in 1984 and 2001 respectively, *Hill* could not have considered the appropriateness of judicial deference to reasonable agency interpretations of statutes, apart from the fact that the agency interpretation had not yet occurred.

More importantly, *Hill* did not consider the issue, presented here, of whether section 7(a)(2) overrides potentially conflicting agency obligations under the agency's governing statutes. In *Hill*, the TVA had argued that its completion of a nearly-completed dam did not constitute

agency "action" within the meaning of section 7(a)(2), and therefore that the provision did not apply. 437 U.S. at 168. The Court rejected the argument, holding that the completion of a nearly-completed dam constitutes agency "action" within the meaning of the provision. *Id.* The Court did not consider, however, whether agency "action," as used in section 7(a)(2), includes both discretionary and non-discretionary actions that the agency takes under its governing statutes, or instead includes only discretionary action. Indeed, no statutory requirements that might have specifically required the TVA to complete the dam – and that might have limited the agency's discretion *not to* complete the dam – were identified or mentioned in the Court's opinion. The Court did not consider, for example, whether the congressional statute authorizing the dam may have limited the agency's discretion not to complete construction – perhaps because the authorizing statute contained no such provision. Although Congress had appropriated funds to build the dam, Congress had not mandated that the dam be built in that particular location. The Court's conclusion that the TVA's activities constituted agency "action" within the meaning of section 7(a)(2) did not mean that such action was not subject to limitations on agency authority contained in other statutes. Thus, *Hill* did not consider the issue raised here.

Indeed, the *Hill* decision contained statements indicating that the Court did *not* mean to suggest that section 7(a)(2) overrides agency obligations under the governing statutes. The Court stated that section 7 "'substantially [amplifies] the obligation of [federal agencies] to take steps *within their power* to carry out the purposes of this act.'" 437 U.S. at 183, *quoting from* 119 Cong. Rec. 42913 (1973) (Rep. Dingell) (emphasis added; original brackets in decision). This statement indicates that the Court held only that section 7(a)(2) requires agencies to take actions "within their power" under other statutes, not that they must take actions that exceed such powers.

III. A CONSTRUCTION THAT SECTION 7(a)(2) OVERRIDES OTHER AGENCY OBLIGATIONS WOULD REQUIRE THE COURTS TO DIFFERENTIATE BETWEEN DIFFERENT KINDS OF AGENCY OBLIGATIONS IN ORDER TO AVOID THE ABSURD RESULTS CAUSED BY SUCH A CONSTRUCTION.

If, as the Ninth Circuit ruled, section 7(a)(2) imposes requirements that override agency obligations under other laws and authorities, the courts would be required to differentiate between different kinds and sources of agency obligations in order to avoid the absurd results caused by such a construction. Otherwise, section 7(a)(2) would be construed as overriding agency obligations under circumstances where Congress, in enacting the CWA, could not have conceivably intended for the provision to apply. The Ninth Circuit construction would place the courts on a slippery slope by requiring them to determine which agency obligations are subject to ESA requirements and which are not, a task that is appropriate for legislative but not judicial consideration.

A. Judicial Decrees

For example, if section 7(a)(2) overrides agency obligations arising under other laws and requirements, as the Ninth Circuit held, then the provision presumably would override agency obligations based on judicial decrees, where the courts have adjudicated rights and required federal agencies to comply with such rights. Under principles of *res judicata*, federal agencies are required, as all are required, to comply with judicial decrees, and cannot modify or seek modification of the decrees for the purpose of asserting additional claims or rights. *See, e.g., Nevada v. United States*, 463 U.S. 110 (1983) (*res judicata* as applied to water rights adjudication decree bars United States from asserting additional water rights claims on behalf of Indian tribes). Certainly Congress did not intend, in enacting the ESA, to authorize federal agencies to modify, or seek modification of, judicial

decrees in order to benefit endangered species. Under the Ninth Circuit decision, however, an agency presumably would have discretion to comply with ESA requirements even though such compliance may be inconsistent with judicial decrees, because, as the court held, the ESA creates "additional authority" that overrides other authority applicable to the agency action.

A salient example of how the Ninth Circuit decision might potentially affect agency obligations based on judicial decrees may be found in the U.S. Bureau of Reclamation's operation of water delivery projects on the Colorado River. The Colorado River provides a major source of water supplies for the seven basin states (New Mexico, Colorado, Wyoming, Utah, Nevada, Arizona and California) through which it flows. *Arizona v. California*, 373 U.S. 546, 552 (1963). The Bureau of Reclamation operates several water projects on the river – including Hoover Dam and Glen Canyon Dam – and has entered into water delivery contracts with major users in the seven basin states, who include many of the West's largest cities and major farming regions. Boulder Canyon Project Act, 45 Stat. 1057 (1928) (Hoover Dam); Colorado River Storage Project Act, 43 U.S.C. § 620 *et seq.* (Glen Canyon Dam). This Court has issued a major decision and decree that establishes the apportionments of each of the lower basin states (Nevada, Arizona and California) to Colorado River water, and that requires the Bureau to comply with these apportionments in operating the projects and signing contracts with water users. *Arizona*, 373 U.S. at 564-565 (decision), 373 U.S. at 340, 342 (decree), 126 S.Ct. 1543 (2006) (consolidated decree). The Bureau's operation of the projects is governed not only by the Supreme Court decree, but also by many other authorities – federal statutes governing the Bureau's operational responsibilities, an international treaty with Mexico, a congressionally-approved interstate compact, the Bureau's contracts with water users in the seven basin states, and other authorities. *See, e.g.*, C. Meyers, "The Colorado River," 19 STAN. L. REV. 1 (1966). This combination of decrees, treaties, statutes, contracts, and other authorities is

collectively known as the Law of the River. *Id.* The Ninth Circuit decision, according to its logic, would hold that section 7(a)(2) trumps all components of the Law of the River – even including the Supreme Court decree – except apparently, as will be explained later, the Bureau's contracts with the water users. As a federal district court recently stated, in holding that section 7(a)(2) does not apply to the Bureau's operation of the projects as they affect endangered species in the Mexican Delta, "it seems unlikely that any case will present facts that more clearly make an agency's actions nondiscretionary than this one: a Supreme Court injunction, an international treaty, federal statutes, and contracts between the government and water users that account for every acre foot of lower Colorado River water." *Defenders of Wildlife v. Norton,* 257 F.Supp.2d 53, 69 (D.D.C. 2003).

B. Express Legislative Commands

The Ninth Circuit's decision, according to its logic, might also require federal agencies to consult under section 7(a)(2) even where Congress has *expressly* directed an agency to take specific action regardless of its effect on endangered species.[8] If, as the Ninth Circuit reasoned,

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[8] This is not an altogether hypothetical example. The Bureau of Reclamation operates the San Juan-Chama Project in New Mexico, and has signed contracts to deliver project water to urban and agricultural users. The Tenth Circuit held that a biological opinion issued by the Fish and Wildlife Service (FWS) failed to adequately protect the endangered silvery minnow, and mandated the Bureau to reallocate a portion of the water from the contractors in order to benefit the minnow. *Silvery Minnow v. Keyes,* 333 F.3d 1109 (10th Cir. 2003), *vacated as moot,* 355 F.3d 1215 (2004). Congress subsequently enacted legislation providing that the Bureau does not have authority to reduce project water deliveries in order to benefit the minnow, and that the Bureau's compliance with the FWS biological opinion shall be deemed to "fully" satisfy ESA requirements until 2013. Energy and Water Development Appropriations Act of 2004, Pub. L. No. 108-137, § 208(a), 117 Stat. 1827 (Dec. 1, 2003). This legislation substantially overrode, and partially mooted, the Tenth Circuit decision, and the Tenth Circuit subsequently vacated its decision. Since Congress has specifically

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section 7(a)(2) creates "additional authority" that overrides agency authority under other statutes and authorities, this "additional authority" presumably would apply even though Congress has expressly provided that it does not apply. To be sure, the Ninth Circuit, faced with this issue, might not apply its reasoning where Congress has expressly decided that ESA requirements do not apply. Nonetheless, the logic of the court's decision would lead to the absurd result that the ESA requirements might apply even where Congress has directed otherwise. To avoid this absurd result, the courts would be required to differentiate between different kinds and sources of agency obligations, depending on the source or clarity of the obligations, and on whatever other rules the courts fashion for making these distinctions. This is an appropriate inquiry for the legislative rather than the judicial branch.

C. "Earlier Agency Commitments"

The Ninth Circuit properly recognized that section 7(a)(2) does not override at least one kind of agency obligation arising outside the ESA. The court stated that the provision requires an agency to consult and avoid jeopardy to the extent these requirements are "both within its decisionmaking authority and unconstrained by *earlier agency commitments.*" *Defenders,* 420 F.3d at 967; App. 38a-39a (emphasis added). These "earlier agency commitments" presumably consist of prior agency actions granting private rights, such as contracts, licenses and permits, where authority was not reserved to modify the rights for the benefit of endangered species. Thus, under the Ninth Circuit decision, section 7(a)(2) overrides all statutory and legal requirements defining agency action, except for requirements that the agency itself has created

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decreed that the FWS biological opinion "fully" satisfies ESA requirements, the Bureau of Reclamation presumably has no authority to comply with section 7(a)(2) requirements in operating the project.

by entering into contracts, issuing permits, and taking similar action.

The Ninth Circuit correctly concluded that section 7(a)(2) does not apply to and override earlier agency "commitments," such as those found in contracts and permits. Indeed, several federal appellate courts, including the Ninth Circuit, have held that section 7(a)(2) does not apply in such circumstances, absent a reservation of authority for the agency to modify the commitments for endangered species purposes. *See, e.g., Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995) (federal agency did not have discretion to modify right-of-way agreement for benefit of endangered species, because agreement did not provide for such modification); *Environmental Protection Information Center v. Simpson Timber Co.*, 255 F.3d 1073 (9th Cir. 2001) (FWS did not have discretion to reinitiate consultation to consider effect of incidental take permit on an endangered species not listed when permit issued, because permit did not authorize consideration of such effects). Thus, for example, if the Bureau of Reclamation enters into contracts with water users, which obligate the Bureau to deliver water from federal reclamation facilities to the users, the Bureau does not have discretion to reallocate the water for the benefit of endangered species, absent a reservation of authority in the contracts to reallocate the water for this purpose.[9] The Ninth Circuit in this case, following its own

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[9] The Tenth Circuit, in a subsequently-vacated 2-1 decision, held that the doctrine of "unmistakable terms," as enunciated by this Court in *United States v. Winstar*, 518 U.S. 839 (1996), authorizes the Bureau of Reclamation under section 7(a)(2) to reallocate water from a federal reclamation project for the benefit of endangered species, notwithstanding that the Bureau may have entered into contracts with water users that did not authorize reallocation for this purpose. *Rio Grande Silvery Minnow v. Keyes*, 333 F.3d 1109, 1139-1141 (10th Cir. 2003) (concurring opinion signed by panel majority), *vacated as moot*, 355 F.3d 1215 (2004). Under the doctrine of unmistakable terms, Congress retains the sovereign power to modify contracts by subsequent legislation, and does not waive this right unless it does so by "unmistakable terms." *Winstar*, 518 U.S. at 877-878. The Tenth Circuit misapplied the unmistakable terms doctrine. The doctrine would apply to the Bureau of Reclamation's

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precedents, properly recognized that section 7(a)(2) does not override prior agency "commitments."

Still, the Ninth Circuit decision – by holding that section 7(a)(2) does not apply to agency "commitments" but does apply to agency obligations arising under other sources of authority – creates an anomaly regarding the kinds and sources of agency authority that are superseded by section 7(a)(2) and those that are not. The court held, in effect, that section 7(a)(2) applies even though this may contravene other legal requirements – perhaps even requirements based on judicial decrees and express legislative commands – but not if its application would contravene agency "commitments." Under the Ninth Circuit view, section 7(a)(2) trumps all agency obligations except for the agency's own "commitments." Under the terms of the statute itself, there is no basis for distinguishing between different agency obligations depending on their source. Rather, section 7(a)(2), as clarified by the Secretary's regulation, applies to "discretionary" federal action, regardless of whether the discretion is found in congressional statutes, judicial decrees, agency "commitments," or something else. The Ninth Circuit's interpretation of the provision creates anomalies that are unsupported either by the statute or the regulation, and would place the courts on a slippery slope in fashioning rules to avoid the anomalies.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Ninth Circuit's decision below should be reversed.

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contracts only if Congress, in enacting the ESA, intended to modify the contracts as necessary to protect endangered species. As argued above, the ESA does not modify, or authorize modification of, existing agency contracts, but instead provides that the ESA requirements apply only where the contracts themselves provide such discretion to the Bureau of Reclamation. Further, even if the unmistakable terms doctrine otherwise applies, the United States would be liable in damages to the contracting parties if it breaches the contracts by reallocating the water.

Respectfully submitted,

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